

SUBJECT: Subsidence Repair or Compensation for Material Damage to Structures or Facilities

DATE: 03/ 2025

APPROVAL: Jonathan Rorrer, Director

Purpose: To establish procedures for subsidence repair or compensation for material damage to structures or facilities, consistent with the amendment of the applicable Surface Mining Rule, as passed into law by WV House Bill 4217 and signed by the Governor on March 25, 2020 with an effective date from passage as June 1, 2020.^{1 2}

Definitions: Subsidence means, as it relates to underground mining operations or auger mining, a sinking, collapsing or cracking of a portion of the earth's surface caused by voids beneath the surface created by mining.

Material damage is any functional impairment of surface lands, features, structures, or facilities; any physical change that has a significant adverse impact on the affected land's capability to support current or reasonably foreseeable uses or causes significant loss in production or income; or any significant change in the condition, appearance or utility of any structure from its pre-subsidence condition.

Legal Authority: W. Va. Code §22-3-14(a), W. Va. CSR §38-2-16.2.c.2 through 4

Policy/Procedures:

The Secretary shall issue a notice, on an MR-6 Inspection Report, to the permittee when subsidence related material damage has occurred to structures or facilities, and that the permittee has ninety (90) days from the date of the notice and at the owner's election to compensate in the amount of the cost to repair the damage, but not to exceed 120% of the pre-mining value of the structure or facility, or compensate the owner in the full amount of the diminution of value resulting from the subsidence.

¹ As noted at §22-3-9(a)(9) and §22-3-18(b)(5), nothing in this article or policy shall be construed to authorize the director to adjudicate property rights disputes.

² This policy only applies to subsidence related damage to structures or facilities caused by underground mining activities conducted after October 24, 1992.

Once material damage resulting from subsidence is determined, the inspector should provide written notice to the permittee that the damage has occurred and order the permittee, at the owner's election, either (1) to compensate the owner in the amount of the cost to repair the damage, but not to exceed 120% of the pre-mining value of the structure or facility or (2) to compensate the owner in the full amount of the diminution in value of the structure or facility resulting from the subsidence. This notice and order can be provided on an inspection report (MR-6) served on and signed by an agent of the permittee or by certified mail. The order should cite 38-2-16.2.c.2 and should describe the location.

Concurrently with the issuance of the order to the permittee, the inspector will provide written documentation (MR-35) to the owner of the finding of material damage. The MR-35 shall notify the owner that it is their responsibility to decide the manner in which they want to be compensated for the material damage to their structure or facility. The choices of compensation are either (1) the amount of the cost to repair the damage, but not to exceed 120% of the pre-mining value of the structure or facility, or (2) the full amount of the diminution in value resulting from the subsidence damage.

To determine the amount of compensation to which the owner of the structure or facility is entitled, two values must first be determined: the pre-mining value of the structure or facility and either the post-mining value or the cost to repair the material damage.

The pre-mining value of structure or facility will be determined by the market value determined by either a West Virginia licensed appraiser or determined by the market value on file with the county assessor's office in which the structure or facility is located; whichever is higher.

The cost to repair the material damage that resulted from subsidence to the structure or facility will be determined by the permittee obtaining three estimates from independent West Virginia licensed contractors. The average of the estimates which meets all technical, quality, and timeline requirements outlined in the solicitation will be selected. The evaluation will consider both cost and demonstrated ability to perform the work to the required standards. Nothing in this policy precludes the owner from providing a certified appraisal from a source such as their homeowner's insurance provider.

It is the permittee's responsibility to obtain all data necessary to present a compensation offer to the owner. Consistent with the intent of WV SCMRA, these negotiations are to be a good faith effort on the part of the owner and the permittee.

Once the permittee has obtained all necessary data to present a qualifying compensation offer to the owner, the permittee shall notify the inspector that a compensation offer has been submitted to the owner. The inspector will contact the owner and determine which method of compensation they have chosen. The inspector will complete an MR-35 noting the method of compensation the owner has chosen and provide the same in writing to the permittee via an MR-6.

The Secretary may extend the ninety (90) day abatement period, but such extensions shall not exceed one (1) year from the date of the notice. Provided, however, that if the permittee demonstrates in writing, and the Secretary concurs that subsidence is not complete that not all probable, subsidence-related material damage has occurred to lands or structures or that not all reasonably anticipated changes have occurred affecting the water supply, and that it would be unreasonable to complete repairs or replacement within the ninety (90) day abatement period, an extension shall be granted. If extended beyond ninety (90) days, as part of the remedial measures, the permittee shall post an escrow bond to cover the estimated costs of repairs to land or structures, or the estimated cost to replace the water supply.

For the Secretary to extend the ninety (90) day abatement period, the permittee must submit and gain approval of a Subsidence Remediation Plan (SRP) as an insignificant permit revision prior to the expiration of the ninety (90) days.

The SRP permit revision is to include:

- 1) a demonstration that subsidence is not complete, that not all probable subsidence related material damage has occurred to lands or structures or that not all reasonably anticipated changes have occurred affecting the water supply, and that it would be unreasonable to complete the repairs or replacement within the ninety (90) day abatement period.
- 2) all necessary documentation as to how the permittee calculated the estimated cost of repairs to the land or structures or the estimated cost to replace a water supply.
- 3) a detailed plan of the scope of repairs to the land or structures or the replacement of the water supply.
- 4) an escrow bond to cover the estimated cost of repairs to land or structures, or the estimated cost to replace water supply.

Division of Mining and Reclamation (DMR)-Inspection and Enforcement staff, along with DMR-Permitting staff will use available, reasonable, and credible resources to approve the permittee's estimated cost of repairs to land or structures or the cost to replace the water supply. If subsidence-related material damage occurs to a structure, the permittee will submit three estimates from West Virginia licensed contractors. The bond amount will be the average of the 3 estimates. DMR Engineers will review the estimates to ensure they cover the scope of work required to repair the subsidence-related material damage.

As part of the SRP permit revision, the permittee is to submit an escrow bond to cover the estimated cost of repairs to land or structures, or the estimated cost to replace water supply. The escrow bond is to meet the provisions set forth in §38-2-11.3.c and be made payable to West Virginia Department of Environmental Protection (WVDEP) in care of the owner as cited in the SRP permit revision. The escrow bond is to be in place until the permittee demonstrates that all subsidence related material damage, as noted in the SRP permit revision, is corrected.

Within one year of the issuance of the notice, the permittee is to provide: (1) a demonstration that all repairs of the subsidence related material damage, as noted in the SRP permit revision, are complete; (2) documentation that the owner(s) of the structure(s) or facilities were compensated in accordance with §38-2-16.2.c.2; or (3) documentation that the operator gave written notice to the owner the opportunity to select either compensation for repairs or compensation for diminished value, by certified mail with a return receipt requested. The demonstration may include an agreement by the owner(s) of the property materially damaged by subsidence that all repairs were completed, or evidence that the owner(s) of the structure(s) or facilities were offered compensation in the amount as required.

If the permittee fails to give written notice to the owner of the opportunity to select either compensation for repairs or compensation for diminished value within the time frames outlined in the SRP permit revision, then a notice of violation is to be issued. The notice of violation shall require the permittee to correct subsidence related material damage that has occurred to... (inspector uses §38-2-16.2.c.1 or 2; whichever is appropriate). Once the notice of violation has been issued, the owner has the option to request that WVDEP make demand for payment of the escrow bond for completion of the repairs. Payment of the escrow bond shall satisfy the obligation of the operator to complete the repairs and the notice of violation shall be abated.

Notwithstanding the foregoing, an operator who tenders a bona fide offer of compensation for repairs or compensation for diminished value that is rejected or ignored by the owner(s) shall, after one year from the posting of the corresponding bond following the date of the MR6 notice, be deemed in compliance with this section. Unless a court of jurisdiction precludes the agency from terminating its notice of subsidence repair, no further action shall be required, and the bond shall be released to the operator.

Nothing in this policy removes the right of the permittee to rebut the presumption of causation that the underground mining operation caused the material damage.